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No. 94-859

In the

Supreme Court of the United States

October Term, 1994

Bruce Babbitt, Secretary of the Interior, et al.,

Petitioners,

v.

Sweet Home Chapter of Communities for a Great Oregon, et al.,

Respondents.

On Writ of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF OF WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION AND FAIRNESS TO LAND OWNERS COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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SWEET HOME CHAPTER OF COMMUNITIES
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BRIEF OF WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION AND FAIRNESS TO LAND OWNERS COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF AMICI

The Washington Legal Foundation ("WLF") is a nonprofit public interest law and policy center based in Washington, D.C., with over 100,000 supporters nationwide.[1] WLF regularly appears before federal and state courts promoting eco-

[1] By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

nomic liberty, free enterprise principles and limited and accountable government. WLF has devoted substantial resources to litigating issues where liberty, both individual and economic, is at risk from the criminalization of conduct not traditionally thought to be unlawful, especially in the environmental area. The Allied Educational Foundation ("AEF") is a nonprofit charitable and education foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in law and public policy. The Fairness to Land Owners Committee ("FLOC") is a Maryland-based national organization with over 8,000 members who are small property owners faced with confiscatory and arbitrary land use regulations involving wetlands, endangered species and similar laws. Both AEF and FLOC have appeared with WLF in land use cases before this Court. *See, e.g., Lucas v. South Carolina Coastal Council,* 112 S. Ct. 2887 (1992); *Dolan v. City of Tigard,* 114 S. Ct. 2309 (1994).

SUMMARY OF ARGUMENT

Petitioners plead for deference to their broad interpretation of Section 9 of the Endangered Species Act of 1973 (the "ESA"), Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-1544 (1988)), which makes it unlawful to "take" an endangered species. Respondents urge that Congress did not intend that the term "harm" embedded in the statutory definition of "take" be expanded to make unlawful "habitat modification" associated with such traditional land uses as farming or forestry. *Amici* urge that the Rule of Lenity — which states that any ambiguity in a statute or regulation with criminal application should be resolved in favor of defendants — governs this case if this Court finds the statute ambiguous.

STATEMENT OF THE CASE

Amici recapitulate the procedural history of this case only to demonstrate that concerns underlying the Rule of Lenity —

such as fair warning of prohibited conduct and the unintended criminalization of day-to-day activities — infuse this case from start to finish. If none of the courts or judges below that addressed the issue could agree on whether the ESA prohibits habitat modification, what notice do innocent landowners have of the conduct proscribed?

Section 9 of the ESA makes it unlawful for any person to "take" any listed species of fish or wildlife. 16 U.S.C. § 1538(a)(1)(B). Section 9 contains no prohibition on the modification of the habitat of threatened or endangered species and the term "take" is defined elsewhere in the ESA only to mean

> to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

16 U.S.C. § 1532(19).

Despite the absence of any reference to habitat modification in the definition of "take," Petitioners, by regulation, defined the term "harm" in the definition of "take" in its broadest possible terms as follows:

> *Harm* in the definition of "take" in the [ESA] means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3.

With the force of this sweeping definition behind it, Petitioners have used the harm regulation to stymie a variety of lawful land uses such as residential development, timber har-

vest and farming and to threaten private landowners with criminal prosecution for taking a listed species if they engage in "modification" of its "habitat." *See* Albert Gidari, *The Endangered Species Act: Impact of Section 9 on Private Landowners*, 24 Envtl. L. 419 (1994).

In the words of Petitioners, the "harm" form of a prohibited "take" includes "unintentional destruction of a listed species or its habitat by heavy equipment during home construction or land use activities." *See* Preliminary Draft Handbook for Habitat Conservation Planning and Incidental Take Permit Processing, U.S. Department of the Interior, U.S. Fish & Wildlife Service 80 (Sept. 15, 1994) (availability announced in 59 Fed. Reg. 65,782-83 (Dec. 21, 1994)) (emphasis in original). Indeed, to Petitioners, the "harm" form of prohibited "take" not only can be unintentional, it can be "inadvertent."[2] *Id.* at 4.

Respondents "are various organizations, businesses and individuals, who depend directly or indirectly on the timber industry in the Pacific Northwest and in the Southeast for their livelihood." *Sweet Home Chapter of Communities for a Great Or. v. Lujan*, 806 F. Supp. 279, 281 (D.D.C. 1992). They brought this citizen's suit under Section 11(g) of the ESA to challenge the agency's sweeping definition of "harm," a definition that puts innocent landowners at risk of criminal prosecution.

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[2] "Inadvertent," of course, means "accidental." *The American Heritage Dictionary* 649 (2d college ed., 1985). Petitioners' interpretation reads out of the ESA the requirement that "take" be knowing, 16 U.S.C. § 1540(b), and ignores that accident is a defense to a general intent crime. *See, e.g., United States v. St. Onge*, 676 F. Supp. 1044, 1045 (D. Mont. 1988) (accident as defense to charge of shooting listed species). *See infra* at 12-13. More to the point here, innocent landowners are at substantial risk of running afoul of the ESA under such a strict liability interpretation of the statute.

The district court sustained the harm regulation, holding that take "encompasses habitat modification." *Id.* at 285. The court noted that even if the ESA was silent or ambiguous, it would uphold the regulation as a "reasonable interpretation of the statute." *Id.* (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984)).

The district court was not detained by arguments that because the ESA was a penal statute, Congress must "'define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Id.* at 285 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). Under the court's view, to avoid conduct leading to "harm" and therefore criminal conviction for prohibited take, an ordinary person would be required to conduct "an evaluation of the species involved, the biological needs of that species, and the degree of habitat modification [permissible], all of which are readily ascertainable" at least according to the court. *Id.* at 286.

The court of appeals affirmed the district court *per curiam*, concluding that such concerns "can be addressed when and if they are properly raised in the framework of a concrete challenge to a particular application of the regulation." *Sweet Home Chapter of Communities for a Great Or. v. Babbitt*, 1 F.3d 1, 3-5 (D.C. Cir. 1994). On appeal, Respondents again emphasized that a broad construction of the harm regulation "left to the whims and predictions of biologists to determine when a habitat modification is '*significant*' and when such a modification '*significantly* impair[s] *essential* behavioral patterns.'" *Id.* at 4. Respondents' concern was that "[p]roperty owners . . . will thus be subject to criminal sanctions under the ESA based on 'some biologist's subjective view.'" *Id.* at 4-5.

Writing in concurrence, Chief Judge Mikva additionally relied on the *Chevron* analysis to uphold the regulation. *Id.* at 8.

Placing the burden on Respondents, he concluded that "[o]verall, there is nothing in the ESA itself or in its legislative history that unambiguously demonstrates that the term 'take' does not encompass habitat modification." *Id.* at 11. He viewed *Chevron* as a "command" to defer to the agency's interpretation of the statute, apparently notwithstanding its criminal application. *Id.*

Judge Williams concurred, but only because he viewed the 1982 ESA amendments, which authorized permits to take listed species in conjunction with otherwise lawful activities, as supporting an *inference* that the take prohibition encompassed habitat modification. *Id.* Otherwise, applying traditional tools of statutory construction, he would have invalidated the regulation. *Id.*

Judge Sentelle dissented. Applying *Chevron*, he concluded that there was no reasonable way that the term harm in the definition of take could include habitat modification:

> I have in my time seen a great many farmers modifying habitat. They modify by plowing, by tilling, by clearing, and in a thousand other ways. At no point when I have seen a farmer so engaged has it occurred to me that he is taking game. Nor do I think it would occur to anyone else that he was taking wildlife. He may be doing something harmful to wildlife, but he is not "taking" it.

Id. at 12.

Respondents petitioned for rehearing. On further consideration, Judge Williams conducted an exhaustive review of the 1982 ESA amendments and determined that the best that could be said is that the amendments supported an *inference* that "*some* prohibited takings are 'incidental' to otherwise lawful activities." *Sweet Home Chapter of Communities for a*

Great Or. v. Babbitt, 17 F.3d 1463, 1467 (D.C. Cir. 1994) (emphasis in original). But, Judge Williams noted, "It does not follow, however, that such incidental takings include the habitat modifications embraced by the [Petitioners'] definition of 'harm.'" *Id.* Thus, the court reversed, invalidating the harm regulation as "neither clearly authorized by Congress" nor a "reasonable interpretation of the statute." *Id.* (citing *Chevron*, 467 U.S. at 842-44).

The court emphasized that the ESA was a criminal statute and the regulatory definition of the term "harm" potentially applied to "[a] farmer who harvests crops or trees on which a species may depend" so that "if the benefit [of the habitat] withdrawn be important, then the regulation sweeps up the farmer's decision." *Id.* at 1464-65. To avoid this strange result, the court applied the maxim *noscitur a sociis* — words should be known by the company they keep — to avoid giving unintended breadth to the statute. *Id.* at 1465.

Judge Mikva dissented, complaining that the majority "jettison[ed] the *Chevron* standard." *Id.* at 1473. He maintained that the ESA and its legislative history are silent or at best ambiguous as to the scope of the term "harm." *Id.* at 1473-74. He would have given substantial deference to the agency because "[t]ies are supposed to go to the dealer under *Chevron*," apparently even in criminal enforcement actions. *Id.* at 1473.

Petitioners sought rehearing en banc, contending that the court of appeals interpreted the regulation more broadly than the agency and demanding to know under what step of the *Chevron* analysis the court decided the case. The court denied the petition. Announcing that its decision rested on Step 1 of the *Chevron* analysis, the court concluded that "the statute, fairly read in the light of the traditional tools of statutory interpretation, manifests a clear determination by Congress that the prohibitions of § 9 should not reach habitat modification

as defined by the Department, where there is no direct action by the defendant against any member of the species." *Sweet Home Chapter of Communities for a Great Or. v. Babbitt*, 30 F.3d 190, 193 (D.C. Cir. 1994) (internal quotations omitted). The court also noted that "the factors involved in the first 'step' are also pertinent to whether an agency's interpretation is 'reasonable.'" *Id.*

Judge Silberman dissented from the denial of rehearing en banc. In his dissent, he observed:

> Keeping in mind that we are dealing with a criminal statute, I am not at all sure that *Chevron* even governs our review. *Cf. United States v. Thompson/Center Arms Co.*, 119 L. Ed. 2d 308, 112 S. Ct. 2102, 2110 & nn. 9 & 10 (1992) (plurality opinion). That is to say, the *Chevron* presumption that Congress has delegated to the administrative agency primary authority to reconcile ambiguities in statutory language — may not apply when the statute contemplates criminal enforcement. *Cf. Kelly v. EPA*, 15 F.3d 1100, 1107 (D.C. Cir. 1994).

Id. at 194.

It is on this issue that *Amici* write. Judge Silberman was correct in raising the Rule of Lenity issue and this Court can affirm on that ground. *See Thigpen v. Roberts*, 468 U.S. 26, 28 (1984) ("we may affirm on any ground that the law and the record permit and that will not expand the relief granted below") (citing *United States v. New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977)).

ARGUMENT

I. THE RULE OF LENITY GOVERNS REVIEW OF STATUTES OF CRIMINAL APPLICATION AND REGULATIONS PROMULGATED THEREUNDER

In all cases, when the statute is clear, a court must give effect to the unambiguously expressed intent of Congress. *Ratzlaf v. United States*, 114 S. Ct. 655, 662-63 (1994) (when text of statute criminalizing willful structuring of currency transactions is clear, lenity does not apply). But different concerns are raised when a court reviews an *ambiguous* statute with criminal application.

The Rule of Lenity "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." *Dunn v. United States*, 442 U.S. 100, 112 (1979) (citations omitted). Thus, after applying the ordinary tools of statutory construction, if a court is left with an ambiguous statute, the Rule of Lenity applies to resolve the ambiguity in the defendant's favor. *United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2109-10 (1992) (plurality opinion).

The Rule of Lenity has long been employed by this Court as a tool of statutory construction in the context of criminal statutes. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 94 (1820) (Marshall, J.) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself.").[3] Since the dawn of the modern administrative

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[3] *See also Black's Law Dictionary* 1196 (5th ed. 1979); Daniel A. Per-Lee, annot., *Supreme Court's Views as to the "Rule of Lenity" in the Construction of Criminal Statutes*, 62 L. Ed. 2d 827 (U.S. Supp. 1995); 3 *Sutherland Statutory Construction* §§ 59.02-03 (Norman J. Singer ed., 5th ed. 1992).

state, this Court uniformly has relied on or considered the Rule of Lenity to resolve ambiguity in statutes with criminal application without considering or giving deference to agency interpretation. *See, e.g., United States v. Granderson,* 114 S. Ct. 1259 (1994); *Thompson/Center,* 112 S. Ct. 2102; *Williams v. United States,* 458 U.S. 279 (1982); *United States v. Bass,* 404 U.S. 336 (1971); *see also* Daniel A. Per-Lee, annot., *Supreme Court's Views as to the "Rule of Lenity" in the Construction of Criminal Statutes,* 62 L. Ed. 2d 827 (U.S. Supp. 1995).

Lenity is the applicable rule when the statute has criminal application, whether the ambiguity arises in a criminal proceeding or in a civil setting. *Id.; see also Crandon v. United States,* 494 U.S. 152, 168 (1990) (applying lenity in interpreting a criminal statute invoked in a civil action). As this Court has noted:

> [Lenity] is not a rule of administration calling for courts to refrain in criminal cases from applying statutory language that would have been held to apply if challenged in civil litigation.

Thompson/Center, 112 S. Ct. at 2110 n. 10.

The Rule of Lenity has been used in tandem with general notions of fairness to avoid criminalizing otherwise innocent behavior. *See Williams v. United States*, 458 U.S. 279, 290 (1982) (rejecting interpretation of statute making it a federal offense to write a check with insufficient funds because it would "render a wide range of conduct violative of federal law"); *see also United States v. Kozminski*, 487 U.S. 931, 951 (1988) (lenity applies when interpretation "would appear to criminalize a broad range of day to day activity"); *Liparota v. United States*, 471 U.S. 419, 426 (1985) (lenity applies when "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct").

From these established precedents, it is clear that this Court resolves ambiguity in statutes with criminal application in favor of the person whose innocent conduct might otherwise be swept up in the rush to give deference to an agency interpretation. These precedents guide this Court for good reason — with an agency unaccountable to the electorate. As Justice Scalia has noted, the "temptation to stretch the law to fit the evil is an ancient one, and it must be resisted." *Moskal v. United States*, 498 U.S. 103, 132 (1990) (Scalia, J., dissenting).

A. Harm by Habitat Modification Has Been, and Will Continue To Be, Prosecuted as a Criminal Offense.

The ESA is a criminal statute. Violation of it or Petitioners' regulation at issue here carries substantial criminal sanctions:

> Any person who knowingly violates, . . . any provision of this chapter, or any provision of any . . . regulation issued in order to implement subsection . . . (a)(1) . . . (B) . . . of section 1538 of this title [prohibiting "take"] *shall upon conviction, be fined not more than $50,000 or imprisoned for not more than one year, or both.*

16 U.S.C. § 1540(b) (emphasis added).

In addition to fines and imprisonment, the ESA authorizes criminal forfeiture:

> All guns, traps, nets, and other equipment, vessels, vehicles, aircraft, and other means of transportation used to aid the taking, possessing, selling, purchasing, offering for sale or purchase, transporting, delivering, receiving,

> carrying, shipping, exporting, or importing of any fish or wildlife or plants in violation of this chapter, any regulation made pursuant thereto, or any permit or certificate issued thereunder shall be subject to forfeiture to the United States upon conviction of a criminal violation pursuant to subsection (b)(1) of this section.

16 U.S.C. § 1540(e)(4)(B); *see Sammons v. Commissioner*, 838 F.2d 330, 336 (9th Cir. 1988); *United States v. 2,507 Live Canary Winged Parakeets*, 689 F. Supp. 1106, 1120 (S.D. Fla. 1988).

The ESA's criminal penalties may be enhanced by application of the Sentencing Reform Act of 1984. *See, e.g., United States v. Tran*, 955 F.2d 288 (5th Cir.) (applying Title 18 U.S.C. app. 4, § 2Q2.1 to increase penalty for ESA violation because the one species taken was substantial relative to overall population), *cert. denied*, 113 S. Ct. 127 (1992). Similarly, the Criminal Fines Improvements Act of 1987 may result in significantly higher criminal fines, up to $100,000 per violation for individuals, 18 U.S.C. § 3571(b)(5), and up to $200,000 per violation by a corporate violator.[4] 18 U.S.C. § 3571(c)(5).

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[4] In addition, under the Lacey Act, any person who

> knowingly imports or exports any fish or wildlife or plants in violation of any provision of this Act . . . knowing that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation, shall be fined not more than $20,000, or imprisoned for not more than five years, or both.

16 U.S.C. § 3373(d)(1)(A). The Lacey Act is often used in tandem with, or in lieu of, the ESA misdemeanor provisions to obtain a felony convic-

In 1978, Congress amended the ESA to lessen the intent standard for a violation of the "take" prohibition by requiring only a *knowing* act as opposed to a *willful* one. *See* Pub. L. No. 95-632, § 6, 92 Stat. 3751 (1978). Now, the intent standard is the same for both criminal and civil violations, whether in cases for injunctive relief or in criminal proceedings, and the body of law developed in the civil context informs criminal proceedings. *Compare* 16 U.S.C. § 1540(a)(1) (civil penalties) *with* 16 U.S.C. § 1540(b)(1) (criminal penalties).

The "knowing" standard has been interpreted to mean that the prosecution need prove only that the defendant had the general intent to carry out the proscribed conduct. *See, e.g., United States v. Nguyen*, 916 F.2d 1016, 1020 (5th Cir. 1990) (defendant need only have intended to possess a turtle, rather than to know that the turtle possessed was endangered); *United States v. St. Onge*, 676 F. Supp. 1044 at 1045 (defendant need only have intended to shoot his gun; no defense that he did not know the animal was endangered or threatened); *United States v. Billie*, 667 F. Supp. 1485, 1492-93 (S.D. Fla. 1987) (same).[5]

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tion and enhanced penalties when the conduct violates state law as well as the ESA. *See, e.g., United States v. Doyle*, 786 F.2d 1440 (9th Cir.) (affirming conviction under Lacey Act for violating state wildlife permit, but reversing conviction under ESA for insufficient evidence), *cert. denied*, 497 U.S. 984 (1986). Thus, violations under the ESA may be prosecuted as criminal misdemeanors or felonies, depending on the circumstances.

[5] These cases apparently rest upon the legislative history to the 1978 amendments to the ESA. A committee report noted that the ESA did "not intend to make knowledge of the law an element of either civil penalty or criminal violations of the Act." *See* H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 26, *reprinted in* 1978 U.S.C.C.A.N. 9484, 9493. Of course, knowingly shooting a gun at an animal is different in kind than knowingly plowing one's field.

The General Accounting Office reports that there have been 126 criminal prosecutions under the ESA for violations of the "take" prohibition. General Accounting Office, *Endangered Species Act: Information on Species Protection on Nonfederal Lands*, GAO/RCED-95-16, at 11-12 (1994) [hereinafter the "GAO Report"]. Of these, at least seven were brought on the basis of "habitat modification" on non-federal lands, although the cases are not identified and the details of the conduct leading to criminal prosecution are not discussed in the GAO Report. *Id.* at 13. Several criminal prosecutions for habitat modification have been reported widely, however.

In 1987, the City of Rancho Palos Verdes, California, was criminally prosecuted for taking an endangered butterfly by destroying its habitat. *United States v. City of Rancho Palos Verdes*, 841 F.2d 329, 330 (9th Cir. 1988). The City successfully defended the criminal charge on the basis that, as a municipal corporation and a political subdivision of the State, it was not a "person" under the ESA. *Id.* The ESA subsequently was amended to resolve the ambiguity of who could be prosecuted, Pub. L. No. 100-478, § 1001, 102 Stat. 2306 (1988), so that municipalities as well as any "individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government [or] of any State" are now at risk of criminal prosecution for alleged habitat modification of a listed species. 16 U.S.C. § 1532(13).

It is now a common tactic for Petitioners to threaten public entities and officials for issuing permits for ordinary and lawful land use activities that, in Petitioners' judgment, result in harm to a listed species through habitat modification. *See* Robert D. Thornton, *Takings Under the Endangered Species Act Section 9*, 4 Nat. Resources & Env't 50-51 (Spring

1990).[6] Petitioners generically threatened public officials and landowners alike in the "informal" guidelines for authorizing or conducting timber harvesting and related activities in and around activity centers of the threatened northern spotted owl.[7] *See* U.S. Fish and Wildlife Service, Region 1, Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl (July 1, 1990) [hereinafter the "Guidelines"]. Petitioners included this admonition for permitting agencies: "Because the states authorize private timber harvest, they may be party to take on private lands, as well as on state lands." *Id.* at 13.

Petitioners' actions are not confined to the Pacific Northwest. In January 1992, three civilian employees of the Department of the Army were indicted for allegedly taking endangered Red-Cockaded Woodpeckers by authorizing an oth-

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[6] For example, Thornton reports that the U.S. Fish and Wildlife Service (the "FWS") sent a letter to a city in California that proposed to zone certain property for development in the habitat of an endangered species, stating:

> Section 9 of the Endangered Species Act of 1973 . . . makes it unlawful for any person to take an endangered species without a permit. . . . Section 11 of the Act prescribes civil penalties of up to $10,000, or imprisonment for up to one year, or both, for knowingly violating any provision of the Endangered Species Act. . . . [W]e must advise you, unless you first secure a section 10(a) permit authorizing the incidental take. . . , the approval and implementation of the proposed action may subject . . . city officials to investigation by our law enforcement branch regarding potential violations of the Endangered Species Act.

Id. at 51.

[7] The Guidelines are discussed in detail below, *see infra* at 19-20.

erwise lawful commercial harvest on a military installation. *See* Indictment, *United States v. Dunn et al.*, Crim. No. 92-117-COL (JRE) (M.D. Ga., filed Jan. 28, 1992). There were no allegations of dead or physically injured woodpeckers and the only "harm" alleged was permitting the harvest of known nesting and cavity trees where woodpeckers *could* nest, thereby leaving woodpecker colonies in the vicinity without sufficient habitat in which to forage. *Id.* at 6-8.

Widely reported is the federal case against a Taiwanese farmer near Bakersfield, California, who was indicted for discing his field. *United States v. Wang Lin Farms, Inc. & Taung Ming-Lin,* CR-F-94-5041 SSH (E.D. Cal., filed Mar. 23, 1994) [hereinafter the "*Lin Farms Indictment*"]. It was reported that on February 20, 1994, a squadron of two dozen state and federal agents, accompanied by helicopters, descended on Lin's farm, seized his tractor and disc, and arrested him for violating the ESA; his farm was home to the endangered Tipton Kangaroo Rat.[8] *See, e.g.,* Chicago Tribune, May 30, 1994, N11.

The indictment is most instructive. *See* Appendix A. The government alleged that defendant "did knowingly take an endangered species of wildlife, to wit: Tipton Kangaroo Rats, by discing habitat essential to the survival of the Tipton Kangaroo Rats." *Lin Farms Indictment* at 1-2.

This is a truly remarkable indictment given that habitat essential to the survival of a listed species is the definition of critical habitat, 16 U.S.C. § 1532(5), and the ESA only prohibits the government, not private persons, from modifying critical habitat. *See* 16 U.S.C. § 1536(a)(2). Petitioners deny

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[8] *See* 53 Fed. Reg. 25,608 (Jul. 8, 1988) (codified at 50 C.F.R. pt. 17) (listing as endangered and determining not to designate critical habitat at the time of listing).

before this Court that the ESA can, has or will be enforced in this way, Pet. Br. at 16, 45-49, but their actions speak louder than their words, and the court below was correct in noting precisely this circumstance. *Sweet Home*, 30 F.3d at 192 (Judge Williams noted that "the government misrepresents" its position on the effect of destruction of critical habitat for grizzly bears).

The government filed a superseding indictment (*see* Appendix B), deleting the "essential habitat" element as to the rat, but adding two more counts of unlawful taking, one for the San Joaquin Kit Fox and another for the Blunt-Nosed Leopard Lizard; three counts in all from the same single act of farming. *United States v. Wang Lin Farms, Inc. & Taung Ming-Lin*, CR-F-94-5041 SSH (E.D. Cal. filed May 24, 1994). While still purporting to rely on a definition of "harm" meaning "an act which actually kills or injures wildlife," 50 C.F.R. § 17.3, the government did not allege any dead or injured rats, foxes or lizards. Early reports indicated that the government did not know whether some rat parts seized from the field in the midnight raid were from the listed rat because "the only thing that distinguishes them from the Herman's Kangaroo rat, for instance, [which is not listed] is that their rear feet are 1-100th of an inch longer."[9] Chicago Tribune, May 30, 1994, N11.

To be clear that the *Lin Farms Indictment* is about habitat modification, one need only read the reported public statements of the prosecuting Assistant U.S. Attorney: "We're

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[9] Petitioners have the authority under the ESA to treat species with such similarity of appearance as if they were listed "when enforcement personnel would have substantial difficulty in attempting to differentiate between the listed and unlisted species." 16 U.S.C. § 1533(e)(A)-(C). Petitioners have listed no other rats similar in appearance to the Tipton Kangaroo Rat.

enforcing the Endangered Species Act. This was an unlawful and knowing take of *habitat*." Los Angeles Times, June 10, 1994, A1, col. 1 (emphasis added). The prosecutor's statement was echoed later by the Regional Director of the FWS in a letter to the editor where he confirmed that the charges against the farmer were for a "knowing take of endangered species *by discing habitat of listed species*." Sacramento Bee, June 27, 1994, B13 (emphasis added).

The U.S. Attorney has since dropped the charges against Lin personally, and his tractor, but has maintained charges against Lin's company in yet another superseding indictment. *See* Appendix C; *United States v. Wang Lin Co.*, CR-F-94-5041 SSH (E.D. Cal., filed Jan. 12, 1995); *see also* Los Angeles Times, July 1, 1994, A26, col. 1; The Fresno Bee, Jan. 18, 1995, A1. The trial reportedly is scheduled to commence in May 1995. San Francisco Chronicle, Jan. 19, 1995, A15; The Fresno Bee, Feb. 7, 1995, B2 & March 7, 1995, B2.

As these cases demonstrate, the ESA has been and will continue to be enforced as a criminal statute even when there is no proof of actual death or physical injury to an identifiable listed species so long as the government is allowed to treat ordinary land uses as unlawful habitat modifications.

B. The Harm Regulation Has Been Applied Broadly by Petitioners, Reaching Many Types of Ordinary Land Use Activities, Treating Them as Unlawful Habitat Modification.

As the above examples of criminal prosecution for habitat modification demonstrate, there is a great and very real risk to private landowners who engage in traditional land use activities in or around the habitat of threatened or endangered species. Contrary to Petitioners' assertions in their Brief to this

Court, the "harm" regulation is neither narrowly tailored nor carefully applied. Pet. Br. at 16, 45-49.

Petitioners' enforcement of the spotted owl Guidelines illustrates the breadth of the regulation. The Northern Spotted Owl (*strix occidentalis caurina*) was listed as a threatened species on June 26, 1990. *See* Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114 (codified at 50 C.F.R. § 17.11). In July 1990, FWS made available the "informal" Guidelines to those who requested them, purportedly to define biologically when a prohibited take would occur from timber harvesting and related activities in and around known spotted owl sites. *See* Guidelines.

The Guidelines established "owl circles" of various sizes centered on an owl nest site or center of activity. Timber harvest and other forest management activities were prohibited in varying degrees within these circles. Specifically, the Guidelines required that the best available 70 acres of suitable habitat (the oldest, largest and most merchantable trees) around the activity center be retained along with the next 500 acres of suitable habitat within 0.7 miles of the activity center, and then 40 percent of the rest of a circle with a radius of 1.2 to 2.2 miles, depending on location. *Id.* at 10. Under the Guidelines, any harvest activity within the suitable habitat within the circle would result in a prohibited take.

The Guidelines were withdrawn in the face of a substantive and procedural challenge under the ESA and the Administrative Procedures Act (the "APA") by Respondents herein. *Sweet Home Chapter of Communities for a Great Or. v. Turner*, No. 91-2218 (D.D.C. 1991). The case was then dismissed as moot because the government represented to the court that the Guidelines unequivocally were rescinded "thereby clearly indicating its intention no longer to apply or enforce them." *Id.* (Memorandum Order at 4 (entered Feb. 27, 1992)). The government's representation to the

court, of course, has proven to be inaccurate, and the size of the circles has since grown to a radius of 2.8 miles, for example, on the Olympic Peninsula in Washington State. *See* Proposed Special Rule for the Conservation of the Northern Spotted Owl on Non-Federal Lands, 60 Fed. Reg. 9,484, 9,492 (Feb. 17, 1995) (to be codified at 50 C.F.R. pt. 17).

FWS's most recent special rule for the northern spotted owl confirms the continued use of owl circles to define "taking" (as well as the absolute absence of any requirement for proof of actual death or injury to owls for the take prohibition to apply to enforcement). FWS states:

> This proposed rule would ease incidental take restrictions on designated non-Federal lands by limiting the incidental take prohibition for timber harvest activities to actions that fail to maintain the 70 acres of suitable owl habitat closest to a site center for a spotted owl. By proposing this action, the Service is not implying that incidental take cannot occur until harvest activities approach and actually invade an owl's activity center. Rather, the Service is proposing that in certain portions of the owl's range, the incidental take of an owl will no longer be a prohibited activity unless it involves harvest activities within an activity center.[10]

Id. at 9,484.

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[10] One might ask what restrictions needed to be eased if FWS had truthfully withdrawn the spotted owl Guidelines as the government represented it had in court.

Moreover, FWS has selected six areas in Washington State for the continued "take" restrictions defined by large owl circles in order "to fill in gaps in protection under the Forest Plan where the Federal land base alone appears currently to be inadequate to provide for the conservation of the owl."[11] *Id.* It is clear from the proposed owl rule that what Petitioners prohibit broadly, and have been prohibiting all along, is timber harvest across the landscape,[12] not specific "harm" to owls.

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[11] Thus, these prohibitions, especially in special emphasis areas of large circles, exist not to prevent take of the owl, but to press nonfederal lands into the public service of "conserving" the owl.

[12] FWS has now attempted to extend the meaning of "harassment" in the definition of "take" to cover habitat modification, apparently to fill the void left by invalidation of the harm regulation. The special rule for the owl states:

> Timber harvest and related activities that disturb the breeding and nesting functions of spotted owls within activity centers during the breeding season can be considered *incidental harassment* of individual spotted owls. More specifically, incidental harassment of spotted owls generally can include harvest activities that occur within the closest 70 acres of suitable habitat surrounding a site center during the owl's reproductive period. . . . Actions with the potential to disturb nesting spotted owls include, but are not limited to, harvest related activities such as felling, bucking, and yarding; road construction; and blasting.

Id. at 9491 (emphasis added).

It is worth noting that FWS originally proposed a definition of "harass" that included "significant environmental modification or degradation" that "actually or potentially harms wildlife by killing or injuring it, or by annoying it to such an extent as to cause serious disruption in essential behavioral patterns such as feeding, breeding or sheltering." 40 Fed. Reg. 28,712, 28,714 (1975). In its final rule, FWS split the pro-

The infamous "bird letter"[13] program in the area occupied by the golden-cheeked warbler around Austin, Texas, further refutes the image painted by Petitioners here of a narrow interpretation. At hearings last year on ESA reauthorization, one witness testified about her experiences trying to obtain a bird letter from FWS in order to build a family home on her property. When she questioned FWS, she testified, "FWS told us it was irrelevant whether the endangered species were actually on our property. Their concern was for the birds that were supposedly nearby." *Id.*

C. The Harm Regulation Fails to Give Fair Warning of the Many Types of Ordinary Land Uses That May Be Treated as Unlawful Habitat Modifications.

Given that criminal prosecutions have occurred and are continuing, that threats of more prosecutions also have been made and that the harm regulation has been applied broadly to many forms of traditional land use activities now deemed unlawful habitat modifications, this Court should be concerned

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posed rule into a new "harm" definition that included the environmental modification provision and a reformulated "harass" definition that did not. 40 Fed. Reg. 44,412, 44,413 (1975). Moreover, FWS retained a higher degree of fault in the rule to establish harassment, requiring an intentional or criminally negligent act that creates the likelihood of injury to wildlife. *Id.* Thus, the special rule speaks volumes about Petitioners' facile interpretation of the Section 9 prohibition on take.

[13] A bird letter, as the witness explained it to the committee, "acknowledges that a property owner's land has been unoccupied (by warblers) for at least three years, or that there is no suitable habitat on the land." *Reauthorization of the Endangered Species Act Focusing on Conservation of Private Lands: Hearings Before the Senate Committee on Environment and Public Works, Subcommittee on Clean Water, Fisheries and Wildlife,* 103d Cong., 2d Sess. (July 19, 1994) (statement of Mary A. Davidson).

that innocent landowners will be ensnared without warning by the reach of the statute and regulation.

Petitioners have given some examples of what the public needs to know to avoid criminal prosecution for habitat modification under the "harm" regulation:

> Identifying habitat modifications that harm individuals of a species involves understanding the species' life history. For example, the Florida jay scrub is highly territorial and relies for its existence on food cached within its territory. A project that destroys occupied habitat and thus the food supply for that family group is likely to result in their starvation. Similarly, a number of birds are highly site-tenacious, returning year after year to the same nesting site. Removal of nesting habitat on that site is likely to result in loss of the pair's reproductive capability, and may result in loss of the pair for lack of available feeding or nesting habitat. Opening up or fragmenting the habitat may similarly affect the species by introducing increased predation or parasitism.

See Draft Endangered Species Consultation Handbook, U.S. Department of Interior, U.S. Fish & Wildlife Service 4-43 (Nov. 1994). To gain such information, Petitioners seem to expect landowners to peruse the Federal Register daily or risk going to jail. *See Adamo Wrecking Co. v. United States*, 434 U.S. 275, 283 n.2 (1978) ("persons subject to the Act, including innumerable small businesses, may protect themselves against arbitrary administrative action only by daily perusal of proposed emission standards in the Federal Register and by immediate initiation of litigation in the District of Columbia to protect their interests").

But even the Federal Register would not be enough here. At the time this case was brought and at present, none of the spotted owl "guidelines" have been promulgated under the APA as final rules in the Federal Register and no standard has been enunciated by the government to give fair notice to private landowners of what conduct would constitute "harm" to most of the 781 species listed. GAO Report at 4 (number of species listed as of May 10, 1993).

Only recently has FWS even admitted the need to make such conduct more clear. *See* 59 Fed. Reg. 34,272 (July 1, 1994) (policy statement "to identify, to the extent known at the time a species is listed, specific activities that will not be considered likely to result in violation of section 9. To the extent possible, activities that will be considered likely to result in violations also will be identified in as specific manner as possible.").

Of the 781 species listed as either threatened or endangered under the ESA, 90 percent, or 712 species, have some or all of their habitat on nonfederal lands. GAO Report at 4. Of the 712 species, 517 species have over 60 percent of their total habitat on nonfederal land, while 264 of the 712 species are entirely dependent on nonfederal lands for their habitat. *Id.* at 5. Each of these species has its own peculiar habitat needs and, in some instances, species that may be found in the same area have conflicting habitat requirements.[14] Innocent

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[14] *See, e.g.*, Proposed Designation of Critical Habitat for the Pacific Coast Population of the Western Snowy Plover, 60 Fed. Reg. 11,768, 11,771-72 (Mar. 2, 1995) ("The [FWS] also excluded from proposed critical habitat sites that would significantly conflict with the survival and recovery objectives of other listed species. Significant conflicts were identified between the habitat needs of snowy plovers and biological objectives for the California clapper rail, light-footed clapper rail and salt marsh harvest mouse. The two rails and mouse are federally listed endangered species." (scientific names omitted)).

persons today are without notice of what land use activities in Petitioners' view might constitute a prohibited take — cutting trees to open the canopy so the gray wolf may thrive[15] or preserving trees for late-successional, closed-canopy species such as the spotted owl.[16]

Petitioners' definition of "harm" gives no warning at all because it fails to provide any intelligible standard in terms that a common citizen of ordinary intelligence will understand. *See, e.g., Ratzlaf v. United States*, 114 S. Ct. at 663 ("fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed."). A primary policy underlying the Rule of Lenity is that "fair warning should be given to the world in language that the common world will understand." *Moskal*, 498 U.S. at 131 (Scalia, J., dissenting).

The regulatory definition of "harm" is so broad that ordinary landowners of "common intelligence must necessarily guess at its meaning and differ as to its application [and it therefore lacks] the first essential of due process of law." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). Whenever Constitutional issues are implicated, the Court should ensure that the statutory term at issue will

> be construed so that [it is] constitutional. . . . By placing upon a criminal statute a narrow construction, we avoid the possibility of imputing to Congress an enactment that lacks necessary precision.

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[15] *See* 59 Fed. Reg. 60,252 (Nov. 22, 1994).

[16] *See* 55 Fed. Reg. 26,114 (June 26, 1990).

Evans v. United States, 112 S. Ct. 1881, 1893 (1992) (Kennedy, J., concurring); *see Custis v. United States*, 114 S. Ct. 1732, 1743 (1994) (Souter, J., dissenting).

The principle behind the Rule of Lenity is that "before a man can be punished as a criminal under the federal law his case must be plainly and unmistakably within the provisions of some statute." *United States v. Gradwell*, 243 U.S. 476, 485 (1917) (internal quotations omitted); *see also United States v. Bass*, 404 U.S. at 347-49. Not only does the landowner not have notice of the conduct proscribed by the harm regulation, but there is no notice of the liability for a violation. *Bell v. United* States, 349 U.S. 81 (1955) (Rule of Lenity should be applied to resolve any doubt as to whether Congress intended a single transaction to be punished as multiple offenses).

When habitat modification is the charged conduct, how are the violations counted? Per incident of habitat modification? Per incident per day? Per number of animals the habitat could have supported? *See, e.g., Rogers v. United States*, 367 F.2d 998 (8th Cir. 1966) (one count per day under the Migratory Bird Treaty Act (the "MBTA")), *cert. denied*, 386 U.S. 943 (1967); *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978) (one count per species per day under the MBTA); *United States v. Equity Corp.*, Cr. 75-51 (D. Utah Dec. 8, 1975); *United States v. Stuarco Oil Co.*, 73-Cr-129 (D. Colo. Aug. 17, 1973) (one count per animal under the MBTA); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 531 (E.D. Cal.) (one count per act resulting in a violation under the MBTA), *aff'd*, 578 F.2d 259 (9th Cir. 1978).

In the end, the government sums up the problem with its own regulation. In their Petition for Certiorari, Petitioners blithely opine that "the cutting of a nest tree in which an endangered species dwells and breeds can effectively kill the bird, regardless of whether the bird is at home when the tree falls." Appellants' Pet. for a Writ of Cert. at 23. This Court

should not miss that in its example, the government requires no knowledge by the landowner of the bird's presence or its behavioral patterns, no scienter in cutting the tree down, no evidence that the bird actually died and, if so, from what cause, no proof that the bird did not move elsewhere and no hint that the landowner should go free of punishment if the bird survived and reproduced.

II. *CHEVRON* DOES NOT GOVERN REVIEW OF STATUTES OF CRIMINAL APPLICATION; CONGRESS DID NOT DELEGATE THE POWER TO DEFINE A CRIMINAL OFFENSE OF HABITAT MODIFICATION TO FWS

As the above sections illustrate, the case for applying the Rule of Lenity is at it is strongest when an ambiguous statute — that is, a law that fails to give warning of the conduct proscribed — is interpreted by an agency such that innocent persons may be put at risk of prosecution for normal day-to-day activities. Lenity gives ties to the defendant; *Chevron* gives deference to the agencies. *Compare United States v. White*, 888 F.2d 490, 497 (7th Cir. 1989) ("The rule of lenity is a tie-breaker when there is an otherwise-unresolved ambiguity") *with Sweet Home*, 17 F.3d at 1473 (Mikva, J., dissenting) (under *Chevron*, "ties go to the dealer"). In the purely civil context where Congress leaves a statutory gap to be filled through reasonable regulation, the *Chevron* approach makes sense because agencies possess expertise in technical areas not enjoyed by courts,[17] but no such expertise exists in defining

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[17] *Chevron* was a citizen's suit petitioning for review of a rule promulgated by an agency to implement a permit program designed by Congress and imposed on the States under the Clean Air Act. *Chevron*, 467 U.S. at 840 (citing 42 U.S.C. §§ 7502(b)(6) & 7607(b)(1)). The statute required states in areas that failed to meet prescribed national ambient air quality standards set by the Environmental Protection Agency ("EPA") to establish permit programs regulating "new or

criminal behavior, the prerogative of the legislature. *See Liparota v. United States*, 471 U.S. at 424.

This Court has not directly considered whether the Rule of Lenity trumps or supplants the *Chevron* approach when ambiguous statutes have criminal application. It is, however, well aware of the issue. In *Regents of Univ. of Cal. v. Public Employment Relations Bd.*, 485 U.S. 589, 602 (1988), this Court applied neither the Rule of Lenity nor the *Chevron* approach when construing the Private Express Statutes, which establish the U.S. Postal Service monopoly and exceptions thereto, because this Court determined that resort to the legislative history revealed Congressional intent.

However, Justice White, while concurring in the result, stated that this Court's rationale should have been consistent with *Chevron*, giving deference to the agency's postal regulations. *Id.* at 603 (White, J., concurring). Justice Stevens, dissenting, would have narrowly construed the statutes, in part because they imposed criminal penalties, and he cautioned that the Rule of Lenity should apply. *Id.* at 604 (Stevens, J., dissenting).

Still, this Court has been consistent in its preference for resolving statutory ambiguity in favor of lenity when criminal penalties potentially are implicated. Yet, lower courts have not been at all consistent. *Compare United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 649 (2d Cir. 1993) (reversing criminal conviction under Clean Water Act on plain language

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modified major stationary sources" of air pollution. *Id.* EPA implementing regulations allowed states to adopt a plant-wide definition of stationary source as opposed to one in which each source of pollution-emitting devices are regulated. The sole issue before this Court in *Chevron* was whether EPA's interpretation was based on a reasonable construction of the statutory term "stationary source." *Id.* No criminal penalties were prescribed by the Clean Air Act or regulation for a state's failure to attain air standards, to implement a program or to adopt the regulation.

grounds, but suggesting *Chevron* would apply had EPA issued regulations), *cert. denied*, 114 S. Ct. 2764 (1994) *with United States v. Borowski*, 977 F.2d 27 (1st Cir. 1992) (applying Rule of Lenity to the Clean Water Act in construing whether defendant's actions violated EPA regulatory standards and, if so, whether they were punishable by criminal sanctions); *see also United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993) (failing to apply the Rule of Lenity in construing "knowingly" despite the statute's facial ambiguity), *cert. denied*, 1995 U.S. LEXIS 777 (Jan. 23, 1995); *United States v. Wagner*, 29 F.3d 264 (7th Cir. 1994) (considered the Rule of Lenity in construing the meaning of "knowingly" but relying on other decisions that held "knowingly" to mean only general intent); *Conoco, Inc. v. Skinner*, 970 F.2d 1206, 1228 (3d Cir. 1992) (rejecting lenity and applying *Chevron*).

Of course, in the civil context, where *Chevron* normally would apply, "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *United States v. Touby*, 500 U.S. 160, 165 (1991). But even in the civil context, this Court has recognized that such delegation is permissible only "[s]o long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Id.* (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)).

Moreover, this Court has suggested, but not decided, that when the delegation involves a statute with criminal application, "something more than a mere 'intelligible principle' is required." *Touby*, 500 U.S. at 165. Before regulations that pose a heightened risk to individual liberty are sustained, courts should require that Congress provide specific guidance as to the conduct it intends to proscribe. *See United States v. Robel*, 389 U.S. 258, 277, 281 (1967) (Brennan, J. concur-

ring) (area of permissible indefiniteness of delegation narrows when the regulation implicates criminal sanctions; such indefiniteness results in inadequate notice to affected persons).

No such guidance is evident on the face of the ESA; indeed, the regulation itself lacks any specificity. Landowners are left to the whim and speculation of government biologists to learn whether they can use their land at all or will face criminal prosecution for past acts of farming or timber harvest, the very concern raised by Respondents herein and the issue resolved now by applying the Rule of Lenity, not *Chevron* deference. *Sweet Home*, 1 F.3d at 4.

CONCLUSION

The judgment of the court of appeals should be upheld.

Respectfully submitted,

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March 24, 1995

APPENDIX A

UNITED STATES v. WANG LIN FARMS CO., INC., and TUANG MING-LIN

CR-F-94-5041 SSH (E.D. Cal., filed Mar. 23, 1994)

INFORMATION

The United States Attorney charges: T H A T

WANG LIN FARMS CO., INC. and TAUNG MING-LIN,

defendants herein, between on or about February 12, 1994, and on or about February 14, 1994, in the County of Kern, State and Eastern District of California, did knowingly take an endangered species of wildlife, to wit: Tipton Kangaroo Rats, by discing habitat essential to the survival of the Tipton Kangaroo Rats, all of which is in violation of Title 16, United States Code, Sections 1538(a)(1)(B) and 1540(b)(1), Title 50, Code of Federal Regulations, Section 17.21(c), and Title 18, United States Code, Section 2.

DATED: March 23, 1994

Respectfully Submitted,

CHARLES J. STEVENS
United States Attorney

By: /S/
KAREN A. KALMANIR
Assistant U.S. Attorney

APPENDIX B

UNITED STATES v. WANG LIN FARMS CO., INC., and TAUNG MING-LIN, aka: Ming Tang Lin

CR-F-94-5041 SSH (E.D. Cal., filed May 24, 1994)

SUPERSEDING INFORMATION

COUNT ONE: [16 U.S.C. §§ 1538(a)(1)(B) and 1540(b)(1) and 18 U.S.C. § 2 – Unlawful Take and Aiding and Abetting the Unlawful Take of an Endangered Species]

The United States Attorney charges: T H A T

WANG LIN FARMS CO., INC. and
TAUNG MING-LIN,
AKA: MING TANG LIN,

defendant herein, between on or about February 12, 1994, and on or about February 14, 1994, in the County of Kern, State and Eastern District of California, did knowingly take and aid and abet the taking of an endangered species of wildlife, to wit: Tipton Kangaroo Rats, by discing habitat of the Tipton Kangaroo Rats, all of which is in violation of Title 16, United States Code, Sections 1538(a)(1)(B) and 1540(b)(1), Title 50, Code of Federal Regulations, Section 17.21(c), and Title 18, United States Code, Section 2.

COUNT TWO: [16 U.S.C. §§ 1538(a)(1)(B) and 1540(b)(1) and 18 U.S.C. § 2 – Unlawful Take and Aiding and Abetting the Unlawful Take of an Endangered Species]

The United States Attorney further charges: T H A T

WANG LIN FARMS CO., INC. and TAUNG MING-LIN, AKA: MING TANG LIN,

defendants herein, between on or about February 12, 1994, and on or about February 14, 1994, in the County of Kern, State and Eastern District of California, did knowingly take and aid and abet the taking of an endangered species of wildlife, to wit: San Joaquin Kit Fox, by discing habitat of the San Joaquin Kit Fox, all of which is in violation of Title 16, United States Code, Sections 1538(a)(1)(B) and 1540(b)(1), Title 50, Code of Federal Regulations, Section 17.21(c), and Title 18, United States Code, Section 2.

COUNT THREE: [16 U.S.C. §§ 1538(a)(1)(B) and 1540(b)(1) and 18 U.S.C. § 2 – Unlawful Take and Aiding and Abetting the Unlawful Take of an Endangered Species]

The United States Attorney further charges: T H A T

WANG LIN FARMS CO., INC. and TAUNG MING-LIN, AKA: MING TANG LIN,

defendant herein, between on or about February 12, 1994, and on or about February 14, 1994, in the County of Kern, State and Eastern District of California, did knowingly take and aid and abet the taking of an endangered species of wildlife, to wit: Blunt-nosed Leopard Lizard, by discing habitat of the Blunt-nosed Leopard Lizard, all of which is in violation of Title 16, United States Code, Sections 1538(a)(1)(B) and 1540(b)(1), Title 50, Code of Federal Regulations, Section 17.21(c), and Title 18, United States Code, Section 2.

DATED: May 19, 1994.

Respectfully Submitted,

CHARLES J. STEVENS
United States Attorney

By: /S/
KAREN A. KALMANIR
Assistant U.S. Attorney

APPENDIX C

UNITED STATES v. WANG LIN COMPANY, INC., aka WANG LIN FARMS CO., INC.,

CR-F-94-5041 SSH (E.D. Cal., filed Jan. 12, 1995)

SECOND SUPERSEDING INFORMATION

COUNT ONE: [16 U.S.C. §§ 1538(a)(1)(B) and 1540(b)(1) and 18 U.S.C. § 2 - Unlawful Take and Aiding and Abetting the Unlawful Take of an Endangered Species]

The United States Attorney charges: T H A T

WANG LIN COMPANY, INC.
AKA: WANG LIN FARMS CO., INC.

defendant herein, between on or about February 12, 1994, and on or about February 14, 1994, in the County of Kern, State and Eastern District of California, did knowingly take and aid and abet the taking of an endangered species of wildlife, to wit: Tipton Kangaroo Rats, by discing habitat of the Tipton Kangaroo Rats, all of which is in violation of Title 16, United States Code, Sections 1538(a)(1)(B) and 1540(b)(1), Title 50, Code of Federal Regulations, Section 17.21(c), and Title 18, United States Code, Section 2.

COUNT TWO: [16 U.S.C. §§ 1538(a)(1)(B) and 1540(b)(1) and 18 U.S.C. § 2 – Unlawful Take and Aiding and Abetting the Unlawful Take of an Endangered Species]

The United States Attorney further charges: T H A T

WANG LIN COMPANY, INC.
AKA: WANG LIN FARMS CO., INC.,

defendant herein, between on or about February 12, 1994, and on or about February 14, 1994, in the County of Kern, State and Eastern District of California, did knowingly take and aid and abet the taking of an endangered species of wildlife, to wit: San Joaquin Kit Fox, by discing habitat of the San Joaquin Kit Fox, all of which is in violation of Title 16, United States Code, Sections 1538(a)(1)(B) and 1540(b)(1), Title 50, Code of Federal Regulations, Section 17.21(c), and Title 18, United States Code, Section 2.

COUNT THREE: [16 U.S.C. §§ 1538(a)(1)(B) and 1540(b)(1) and 18 U.S.C. § 2 – Unlawful Take and Aiding and Abetting the Unlawful Take of an Endangered Species]

The United States Attorney further charges: T H A T

WANG LIN COMPANY, INC.
AKA: WANG LIN FARMS CO., INC.

defendant herein, between on or about February 12, 1994, and on or about February 14, 1994, in the County of Kern, State and Eastern District of California, did knowingly take and aid and abet the taking of an endangered species of wildlife, to wit: Blunt-nosed Leopard Lizard, by discing habitat of the Blunt-nosed Leopard Lizard, all of which is in violation of Title 16, United States Code, Sections 1538(a)(1)(B) and 1540(b)(1), Title 50, Code of Federal Regulations, Section 17.21(c), and Title 18, United States Code, Section 2.

DATED: January 12, 1995

Respectfully Submitted,

CHARLES J. STEVENS
United States Attorney

By: / S /
KAREN A. KALMANIR
Assistant U.S. Attorney